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IN THE

Supreme Court of the United States

October Term, 1962
No. 528

R. A. RIDDELL, District Director of Internal Revenue, Los Angeles District,

Petitioner,

vs.

MONOLITH PORTLAND CEMENT CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

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SUBJECT INDEX

	PAGE
Argument	5
Conclusion	12
Appendix. Pertinent Cases Cited	App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Cahill v. New York, N H. & H R. Co., 351 U. S. 183	12
California Portland Cement Co. v. Riddell, 3 A. F. T. R. 2d 438, mod. 247 F. 2d 345	8
Chamelton case, 364 U. S. 76	9, 12
Charles Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552	4
Cherokee Brick & Tile Co. v. United States, 218 F. 2d 424	6
Helvering v. Hallock, 309 U. S. 106	11, 12
James v. United States, 366 U. S. 213	11
Longhorn Portland Cement Co. v. United States, W. D. Tex., 8 2-61, pending 5th Cir., No. 19010	8
Monolith Portland Midwest Co. v. R. A. Riddell, S. D. Cal. 9 - 62, 9th Cir.	8
Monolith Portland Cement Company v. United States, 168 Fed Supp. 602, 249 F. 2d 620	7, 8, 9
Mutual Ins. Co. v. Hill, 193 U. S. 247	5
Mutual Life Insurance Co. v. Hill, 193 U. S. 551	4
Portland Cement Co. of Utah v. United States, 6 A. F. T. R. 2d 5902, remanded 293 F. 2d 820, reaf. 9 A. F. T. R. 2d 758	8
Riverside Cement Co. v. United States, 2 A. F. T. R. 2d 6175	8
Santigol Iced & Fish Co., Re, 240 U. S. 247	4
Union Trust Co. v. Eastern Air Lines, 350 U. S. 902	12
United States v. Dragon Cement Company, 244 F. 2d 513	6, 7, 8
United States v. James, 366 U. S. 213	5
United States v. Merry Brothers Brick & Tile Company, et al. (13 consolidated cases), cert. den. 355 U. S. 824	7, 8
United States v. Wrightwood Dairy Co., 315 U. S. 110	3

PAGE

MISCELLANEOUS

House Report No. 939, 87th Cong., 1st Sess. 8

1 Paley Report, pp. 1, 35, President's Materials Policy Commission, Resources for Freedom 9

House Report (Ways and Means Committee), No. 939, 87th Congress, 1st Sess. 10, 11

Senate Finance Committee Report, No. 903, 87th Cong., 1st Sess. 10

Senate Report No. 903, p. 17 11

Senate Report No. 1910, 85th Cong., 2d Sess., pp. 8-12 6

Statistical Abstract of the United States, 1960, United States Department of Commerce, Bureau of the Census, p. 310 10

RULES AND REGULATIONS

Revenue Ruling 280, C. B. 1953-2, 41 ..... 2, 6

Treasury Regulations 118, Sec. 39.23(m)-1(e)(3) 3

STATUTE

74 Statutes at Large, pp. 1017-1018 6

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PETITION FOR REHEARING.

Comes now respondent, Monolith Portland Cement Company, and respectfully prays that the Court grant a rehearing herein pursuant to Rule 58, to permit respondent to prepare and submit certain suggested modifications to the Court's summary *per curiam* opinion herein.

The grounds of the petition are that in several important respects essential to the correct execution of the mandate by the courts below, this Court's summary opinion requires authoritative clarification. Be-

cause of the summary reversal on the certiorari papers, of course, respondent had no prior opportunity to present such points.

Respondent respectfully requests permission to aid in the issuance of the appropriate mandate in this case by presenting in adequate detail the facts of the existing voluminous record which support the following points:

1. Contrary to the Court's assumption (Slip. op. p. 1) the Treasury Regulations in force when respondent filed its 1952 return did not provide for a "crushed limestone stage" depletion base. Respondent paid its 1952 taxes on the pre-kiln basis specified by Revenue Ruling 280, C. B. 1953-2, 41 [R. 121, 127], and claimed a refund for the difference between such authorized pre-kiln base and a crushed cement base [R. 10, 41-42]. The Court's language should be corrected to state the true fact that respondent paid its taxes on the pre-kiln basis prescribed by Revenue Ruling 280.

2. The particular subdivision of the depletion statute the Court applied in holding that "limestone" was marketable in crushed form—"minerals customarily sold in the form of a crude mineral product" (§114(b)(4)(B)(iii))—expressly allows the kiln process of "sintering" as part of the depletion base. Without further clarification, the Court's language on this point could

cause further uncertainty below upon numerous minerals in many fields of the mineral industry.

3. The Court's two references to the computation of "constructive income" (Slip op., pp. 1, 3) is understood to refer to both alternative methods provided in Regulations 118, §39.23(m) — 1 (e)(3) for "minerals customarily sold" in crude form (§ 114(b)(4)(B)(iii)). This Court did not undertake to decide *which method* is applicable in this case. Therefore, this point is not entirely clear, and since the question may be important with relation to the many specific available markets the Court refers to in its Opinion, the point should be clarified.

4. Both the Government's "Question Presented" in its petition and the Court's Opinion were phrased exclusively in terms of the correct application of the statutory term "mining". However, since the Opinion is silent and does not touch upon the other issues in the case, or as to the court to which the case is to be remanded, we respectfully suggest that in the interest of expediting this ancient case in the lower courts, the Court direct that it be remanded to the court of appeals, so that it may apply this Court's construction of the statutory term "mining" to the remaining issues, the Regulations and the existing complete record. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110).

5. Respondent is well-aware that the pressing demands upon the Court's time require that only major questions of national importance be decided. At the same time, we are not unmindful of the settled rule that a judgment of reversal is not an adjudication of any other than the questions in terms discussed and decided. *Re Sanford Tool & Fork Co.*, 160 U.S. 247, 258-259 (1895); *Mutual Life Insurance Co. v. Hill*, 193 U.S. 551 (1904). A reversal and remand with directions for "proceedings in accordance with this opinion" leaves open for lower court action the questions this Court did not decide, with a second certiorari remedy available if necessary to correct the action subsequently taken by the Court of Appeals. *Charles Wolff Packing Co. v. Court of Industrial Relations*, 267 U. S. 552 (1925).

ARGUMENT.

In its opinion the Court cited the court of appeals' opinion, which was based upon: (1) a finding that the applicable statute allowed a finished cement cut-off in this case; (2) a holding that even if not so, Congress, in granting an option to cement producers for the period 1951-1960 inclusive, intended that "existing law" be applied to those producers (like respondent) who decided not to accept the pre-kiln-feed cut-off point, and that "existing law" allowed the finished cement cut-off; (3) a holding that the long-established and recently reaffirmed principle of not applying a new Supreme Court decision retroactively when to do so would result in the severe financial embarrassment of taxpayers who had relied upon the law as it had existed prior thereto (*United States v. James*, 366 U.S. 213), should be applied here; (4) the approval of the district court's application of the principles of *res judicata* and collateral estoppel to the Government's admission of the practical identity between the quarrying, processing and marketing conditions of the prior test case and this case, although such approval was not necessary to its decision on the merits.

We believe that the long and firmly established rule that upon reversal by this Court only legal points examined, discussed and decided by the Court are affected by the decision (*Mutual Ins. Co. v. Hill*, 193 U.S. 247) applies here. This leaves for the lower courts the correction of their published judgments and opinions to reflect point (1) a statutory crushed limestone cut-off, and in so doing record the present law of the case—points (2) "existing law", (3) non-retroactivity, and (4) *res judicata*. If the lower courts

resolution of the remaining questions is thought by either party to be incorrectly done, proper application can then be made to this Court.

This procedure would dictate, we respectfully submit, that the case be remanded to the court of appeals, as the district court would be bound by the law of the case established by the opinion and judgment of the court of appeals on the issues not considered by this Court, unless and until changed by the court of appeals itself.

We respectfully submit that a remand to the court of appeals would best serve the ends of justice, as the record shows, without dispute, that when respondent elected to have its cut-off determined in accordance with "existing law" in the fall of 1960, it relied upon the "existing law" as of that date, which was: (1) The Treasury's publication, in 1953, of Revenue Ruling 290, 1953-2 C. B. 41 (in effect 1953-1961) that "calcium carbonates . . . mined for use in the cement industry, are not customarily sold in the form of a crude mineral product"; (2) commencing with *Cherokee Brick & Tile Co. v. United States*, 218 F. 2d 424 (5 Cir., 1955), the unanimity of all the courts of appeal construing the statutory word "mining" to include the additional necessary processing to obtain a salable mineral product when the mineral was not marketable in crude form, and the application of such rule to the calcium carbonates used in the cement industry, *United States v. Dixon Lime Company*, 244 F. 2d 513 (4 Cir.,

[illegible] September 14, 1960 [illegible] No. 1650, 86th Cong., 2d Sess., p. 12.

1957);[2] (3) the denial by this Court of the Government's petitions for certiorari to review 14 cases involving such rule in 1957 (including one cement case—*Dragon*);[3] (4) Four days following the denial of certiorari in such cement and clay cases, the Treasury's issuance of Technical Information Release No. 62, announcing that "in view of" such denial of certiorari the Internal Revenue Service was "taking steps to dispose of pending litigation and claims involving brick and tile clay and cement rock, as required under these decisions"; (5) the first *Monolith* case, in 1958, where it was found as a fact that Monolith's "calcium carbonates" were not marketable unless processed into cement, *Monolith Portland Cement Company v. United States*, 168 F. Supp. 692, S. D. Cal. 1958, and such finding was accepted by the Government on the appeal and approved by the court in allowing a finished cement cut-off,[4] 269 F. 2d 629, 632-633 (9 Cir., 1959);

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[2] As the Court said in *Dragon* (244 F. 2d 513, 519): "we conclude that taxpayer is entitled to a percentage depletion deduction based upon its gross income from cement as the first commercially marketable mineral product obtainable from the deposit, calcium carbonates, after the ordinary treatment processes normally applied by such mine owners."

[3] *United States v. Dragon Cement Company*, certiorari denied, 355 U. S. 833 (1957); *United States v. Merry Brothers Brick & Tile Company, et al.* (13 different cases involving the meaning of "mining" decided by the Fifth Circuit consolidated by the Government for purposes of certiorari); certiorari denied, 355 U. S. 824 (1957).

[4] As the court of appeals said: "269 F. 2d (629, 632): "The base on which the depletion allowance is to be computed is that of a commercially marketable product. If the raw product of the mine is not commercially marketable, then the base is to be the first commercially marketable product produced by applying ordinary treatment processes to such product." (citations). In our case the court found that the first commercially marketable product of the limestone resulting from the application of ordinary treatment processes was Portland cement. The Government has accepted that finding.

(6) As noted by the House of Representatives (House Report No. 939, 87th Cong., 1st Sess.), the Government's assumption that the principles of *Merry Brothers* and *Dodson* were the existing law by recommendations in two budget messages to Congress and by communications to Congress in 1958 and 1959 "on the need to revise the law" for the brick and cement industries; (7) the Government's failure in 1959 to even seek certiorari from the finished cement cut-off decision in the first *Monolith* case; (8) the subsequent settlement by the Treasury of some "calcium carbonates"—cement cases on a finished cement cut-off, including one case involving Monolith's principal competitor; (9) the unanimity of all the lower courts in approving a finished cement cut-off in "calcium carbonates"—cement cases, 1957-1962; (10) the Government's 1959 admissions in this case that "We know of no limestone industry nor any designation by it for rock of the type mined by the plaintiff." [R. 96].

Such settlement occurred after the trial. *Riverside Cement Co. v. United States*, 2 AFTR 2d 5175 (S. D. Cal. 1958), and no appeal was taken.

Riverside Cement Company v. United States, 144 F. Supp. 188, rev'd, 244 F. 2d 513, 1 Cir. 1957, certiorari denied 355 U. S. 833 (1957). *Monolith Portland Cement Co. v. United States*, 168 F. Supp. 902, S. D. Cal. 1958, aff'd 269 F. 2d 629 (9 Cir., 1959). *Riverside Cement Co. v. United States*, 2 AFTR 2d 5175 (S. D. Cal. 1958); *California Portland Cement Co. v. Riddell*, 3 AFTR 2d 838 (S. D. Cal. 1959); mod. on appeal, 284 F. 2d 845, 9 Cir. 1960, cert. denied on still earlier 1960 legislation, 365 U. S. 835 (1961). *Portland Cement Co. of Utah v. United States*, 3 AFTR 2d 582, remanded for consideration of "intervening legislation" applied to cement rock, 293 F. 2d 826 (10 Cir. 1961), and reinstated by district court, 9 AFTR 2d 758, pending 10th Cir. No. 7028. *Lehigh Portland Cement Co. v. United States*, 9 AFTR 2d 5011, pending 5th Cir. No. 19010. *Monolith Portland Midwest Co. v. Kelly, Riddell*, S. D. Cal. 62-, pending 9th Cir.

and that the mineral, processes and markets were the same in this case as in the first *Monolith* case [*R.* 66, 79, 91-92]; (11) this Court's express exclusion of the 54 unanimous lower court decisions (including the calcium carbonates—cement cases), as "inapposite" and "distinguishable" from *Caughlon*, 364 U. S. 76, 89 (1960).

These conditions were well known to Congress when it enacted the 1960 cement legislation, and the Congressional declaration that cement producers not accepting a kiln-feed cut-off to buy their peace, should have their cut-off "determined under existing law," fixed the law as it then existed—in 1960—as the "existing law" referred to.

This is easily understandable when it is remembered that Congress learned from bitter experience in two world wars that the national safety depends upon the availability of adequate domestic minerals and ores. This aspect may receive additional importance in the future since the two largest nations (United States and Russia) now depend greatly upon submarines and a primary mission for submarines is to make ocean traffic extremely hazardous and expensive. Since domestic minerals and ores must compete with foreign sources and domestic substitutes, Congress realized that the availability of adequate domestic minerals and ores in war time depended upon the allowance of a reasonable income tax deduction to the owners of domestic minerals and ores for the exhaustion of such irreplaceable capital assets.[7] It is also significant that this procedure and treatment of our minerals and ores results in na-

[7] The Paley Report, "Resources for Freedom," President's Materials Policy Commission, Vol. I, pp. 1, 35.

tional prosperity in peace time, since 67% of all the nation's 237 billion dollar payrolls are dependent upon the mining, producing, selling, transporting and use of things made from minerals and ores."

When respondent was required to decide whether to accept a kiln-feed cut-off in the fall of 1960, the decision involved struck at the financial heart of its business—involving, as it did, the 9 tax years 1952-1960, and an aggregate of about $2,025,000 difference between a kiln-feed cut-off and a finished cement cut-off for such 9 tax years.[9] We believe that no one would seriously question or contend that this respondent did rely upon such law as it existed in the fall of 1960 in making its decision, especially when ever since "calcium carbonates" were added to the depletion statute in 1951, the Treasury had never sought to apply a crushed limestone cut-off to the cement industry.

Indeed, it is undisputed that both Congress and the Treasury knew and acknowledged that the cement industry had relied upon the denials of certiorari in the 14 cases in 1957, followed by T. I. R. No. 62, in arranging their financial affairs.[10]

[8]Statistical Abstract of the United States, 1960, United States Department of Commerce, Bureau of the Census, p. 310.

[9]As noted above (p. 2), the Treasury conceded early in this litigation that its own Regulations and Rulings provided a kiln-feed cut-off (not crushed limestone or "calcium carbonates" used in cement production (No. 1643, R. 21), and Monolith paid its taxes on a kiln feed cut-off and then sought the difference between such Treasury approved basis and a finished cement basis. The two judgments before the Court in this record show that respondent collected $2,025,000 (plus interest) for 1957, and was awarded a judgment of $180,000 (plus interest) for 1952, or an average of $225,000 (plus interest) per year.

[10]Senate Finance Committee Report, No. 983, 87th Cong., 1st Sess., House Report (Ways & Means Committee), No. 939,

As the court of appeals said: "And it follows then that 'existing law' for the cement industry (*i.e.* for taxpayers operating within the same factual circumstances as taxpayer herein) must be deemed to be the *Dragon Cement* and first *Monolith* cases . . . we do not believe that a taxpayer should be denied for depletion on a nonsalable intermediate product of mining operations when he has in good faith relied upon appellate decisions not taken to the Supreme Court for final determination by the government." (301 F. 2d 488, 496-497).

Thus, if the Revenue now has its way, and applying the postulate in accordance with the rule of evidence that record conditions found to exist are presumed to continue until the contrary is proven, taxpayer will have to dig up more than $2,000,000, at a time when small companies are having a difficult time modernizing to stay alive competitively.

In addition to the conditions and law existing in 1960, when respondent decided to have its cut-off determined by "existing law", two later events were before it and considered by the court of appeals as material to the question of the equities of this case. First, in *James v. United States*, 366 U. S. 213 (1961), this Court had reaffirmed its policy of declining to give retroactive effect to its tax decisions, where taxpayers had made arrangements in past years in reliance upon the law as it then existed—prior to the Supreme Court's latest decision, *Helvering v. Hallock*,

87th Cong., 1st Sess. As the Treasury said in its latter report to the Senate Finance Committee (Sen. Rep. No. 1983, p. 17): "Producers of all these other minerals thought they were entitled to rely on the principles of the *Harvey Brothers* case, and they did so rely in filing their returns."

309 U. S. 106 (1940). Second, in 1961, after *Cannelton*, Congress granted the clay industry this Court had determined was entitled to but a 20c ton raw clay cut-off in *Cannelton* a finished product cut-off with a $1.25 ton depletion base (P.L. 87-312).

Conclusion.

Respondent prays that the Court grant a rehearing herein so as to consider the modifications suggested, and that respondent be permitted to illustrate the importance of and necessity for such modifications in the proper execution of this Court's decision by a more detailed showing.[1] In any event, since the Opinion is silent in this regard, we suggest that here, as in *Union Trust Co. v. Eastern Air Lines*, 350 U. S. 962 (1956), the case "be remanded to the Court of Appeals to permit that court to pass upon the several issues left undecided" by this Court's reversal of its judgment, and to accord that court an opportunity to pass upon issues raised by this Court's opinion as it affects the judgment of the court of appeals *Gahill v. New York, N.H. & H.R. Co.*, 351 U. S. 183 (1956).

Respectfully submitted.

JOSEPH T. ENRIGHT,
NORMAN ELLIOTT,
Attorneys for Respondent.

[1] In the Appendix to this Petition, respondent has collated the applicable authorities on the questions: (a) Effect of the Court's selection and decision of one issue—the statutory cut-off—and not discussing other issues; (b) the non-retroactive application of a subsequent Supreme Court decision where substantial property rights have been built up around a group of decisions of the courts of appeal (denial certiorari), (c) *res judicata* and collateral estoppel, (d) law of the case.

Certificate.

I, NORMAN ELLIOTT, a member of the bar of the United States Supreme Court, do hereby certify, in accordance with Rule 58 of such Court's Rules, that this petition is filed in good faith and not for delay, and that it is restricted to substantial grounds available to the respondent Monolith Portland Cement Company, although not previously presented because of the Court's *per curiam* reversal on the certiorari papers before briefs on the merits could be filed.

NORMAN ELLIOTT

February 5, 1963.

APPENDIX.

A. The Court's Selection and Decision of But One of Several Issues Involved Is Not an Adjudication by the Court of Any Other Than the Issue Actually Discussed and Decided.

1. *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551 (1904):

> "... When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion,—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. . . ."

2. *Charles Wolff Packing Co. v. Court of Industrial Relations*, 267 U. S. 552 (1925);

3. *Communist Party of U. S. v. Subversive Activities Control Board*, 254 F. 2d 314 (CA DC, 1958);

4. *Christoffel v. United States*, 214 F. 2d 265 (CA. DC. 1954);

5. *Washington Gas Light Co. v. Baker*, 195 F. 2d 29 (CA. DC. 1951);

6. *Rector v. Massachusetts Bonding & Insurance Co.*, 191 F. 2d 329 (CA. DC. 1951).

B. A Decision of the Court Changing Earlier Interpretations of a Statute Is Not Given Retroactive Effect Where the Litigant Has Shaped Its Conduct and Interest in Reliance Upon the Settled Course of Such Earlier Interpretations.

1. *Helvering v. Hallock*, 309 U. S. 106 (1940).

"Nor have we in the St. Louis Union Trust Co. Cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. No such conjunction of circumstances requires perpetuation of what we must regard as the deviations of the St. Louis Union Trust Co. decisions from the Klein doctrine. We have not before us interests created or maintained in reliance on those cases. . . ."

2. *Helvering v. Griffiths*, 318 U. S. 371 (1943).

"We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no

intent to tax; if he followed the congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the Government. But we are asked to brush all this aside and simply to decree that these transactions are taxable anyway."

3. *Securities and Exchange Commission v. Chenery Corporation*, 332 U. S. 194 (1947);

4. *James v. United States*, 366 U. S. 213 (1961);

5. *Sagarik v. Udall*, 304 F. 2d 944 (CA, DC, 1962).

C. Under the Doctrines of Res Judicata and Collateral Estoppel, Rights, Questions or Facts Put in Issue and Determined in a Prior Suit Are Conclusively Established for the Purpose of Any Subsequent Suit.

1. *Southern Pacific R. Co. v. United States*, 168 U. S. 1 (1897).

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

2. *Tait v. Western Maryland R. Co.*, 289 U. S. 620 (1933).

"This Court has repeatedly applied the doctrine of *res judicata* in actions concerning state taxes, holding the parties concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. (Citations). . . ."

3. *Commissioner v. Sunnen*, 331 U. S. 591 (1948).

"Thus if a claim of liability or nonliability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit. . . ."

4. *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950).

"We start then with a case which falls squarely within the classic statement of the rule of res judicata in Southern Pacific R. Co. v. United States, 168 U. S. 1, 48, 49, 42 L. ed. 355, 376, 377, 18 S. Ct. 18:

'The general principal announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action,

the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. . . ."

5. *Lynch v. Commissioner*, 210 F. 2d 574 (CA 7, 1954);

6. *Citizens National T. & S. Bank v. United States*, 270 F. 2d 128 (CA 9, 1959).

D. Rulings and Determinations of a Court That Are Not Reversed by It or a Superior Court Constitute the "Law of the Case."

1. *Insurance Group Com. v. Denver & R. G. W. R. Co.*, 329 U. S. 607 (1947).

"When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to final determination. While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review."

2. *United States v. United States Smelting, R. & M. Co.*, 339 U. S. 186 (1950);

3. *Oklahoma Natural Gas Co. v. Concho Const. Co.*, 209 F. 2d 209 (CA 10, 1953);

4. *United States v. Tuffanelli*, 138 F. 2d 981 (CCA 7, 1943);

5. *United States Rubber Co. v. General Tire & Rubber Co.*, 128 F. 2d 104 (CCA 6, 1942).